Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT BELCHER,

Petitioner,

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's holding in *Sims v. Apfel*, 120 S.Ct. 2080 (2000), that a Social Security claimant is not required to exhaust issues in a request for review in order to preserve judicial review of those issues, should also apply to the Court of Appeals for Veterans Claims.

Whether the jurisdiction of the Court of Appeals for the Federal Circuit pursuant to 38 U.S.C. § 7292 is limited to consideration of issues of statutory and regulatory interpretation which were previously presented to the Court of Appeals for Veterans Claims.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review this case decided below by the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit is published as 214 F.2d 1335 (Fed. Cir. 2000) and reprinted in the Appendix ("App.") at App. 1. The opinion of the Court of Appeals for Veteran Claims ("CAVC") in *Belcher v. West* is an unpublished opinion cited as No. 97-1374, 1999 WL 503950 (1999) and reprinted in the Appendix ("App.") at App. 2.

STATEMENT OF JURISDICTION

The Court has jurisdiction to review this petition with respect to this case pursuant to 28 U.S.C. § 1254(1). The judgment of the Federal Circuit was entered on June 16, 2000 and Rehearing En Banc was declined on August 21, 2000.

PROVISIONS INVOLVED

38 U.S.C. § 7292

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with

respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to the United States courts of appeals from United States district courts.

(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Veterans Claims, unless a stay is ordered

by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be –

(A) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules of review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.

STATEMENT OF THE CASE

Mr. Belcher served on active duty in the United States Navy from July 1943 to April 1944. Mr. Belcher's entrance examination revealed no psychiatric disorder. While on active duty, Mr. Belcher was hospitalized in a psychiatric ward, where he was reported to be hostile, withdrawn and seclusive; with persistent auditory and visual hallucinations. Mr. Belcher stated to his treating doctors that his hallucinations had begun when he was about 15 years old. Mr. Belcher was consequently diagnosed with schizophrenia, mental deficiency and psychosis with mental deficiency. Prior to Mr. Belcher's

discharge from the Navy, a Medical Evaluation Board concluded that Mr. Belcher's condition pre-existed his service in the Navy based upon Mr. Belcher's statements to his examiners.

Since his discharge from the Navy, Mr. Belcher has unsuccessfully sought benefits for his psychiatric condition. The claims were consistently denied because the VA determined that Mr. Belcher's psychiatric condition pre-existed his service in the Navy based exclusively upon Mr. Belcher's statements that he began experiencing hallucinations around the age of fifteen.

Mr. Belcher's last claim was denied by the Board of Veteran Appeals in 1996. Mr. Belcher appealed this decision to The United States Court of Appeals for Veterans Claims (CAVC), and the CAVC denied the claim on the merits finding that the statutory presumption of soundness was overcome by evidence that Mr. Belcher's condition pre-existed service.

On appeal to the Federal Circuit, Mr. Belcher argued that pursuant to 38 C.F.R. § 3.304(b)(3), a veteran's own statements cannot be used to rebut the statutory presumption of soundness. 38 C.F.R. § 3.304(b)(3) provides that: "[s]igned statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact." Mr. Belcher argued that the VA's determination that his psychiatric condition began when he was fifteen was based on Mr. Belcher's own testimony that his hallucinations started when he was fifteen.

The Federal Circuit, citing to its recent decision in *Smith v. West*, 214 F.3d 1331, 1334 (Fed.Cir. 2000), dismissed Mr. Belcher's appeal because the regulatory interpretation of 38 C.F.R. § 3.304(b) had not first been raised before the CAVC. The Federal Circuit further held that this Court's reasoning in *Sims v. Apfel, supra,* was not controlling since in *Sims* there was no jurisdictional statute at issue. The Federal Circuit held that 38 U.S.C. § 7292(a) spoke directly to the requirement of issue exhaustion. The Federal Circuit further distinguished *Sims* by reasoning that *Sims* dealt with review of an agency decision by a court, as opposed to the present case that dealt with review of another court's judgment. *Belcher*, 214 F.3d 1335, 1337 (Fed. Cir. 2000).

REASONS FOR GRANTING THE WRIT

In light of the Court's recent holding in *Sims v. Apfel*, 120 S.Ct. 2080 (2000), this case provides the Court with an opportunity to resolve a conflict of law currently existing in the Federal Circuit regarding their jurisdiction to decide issues that were not explicitly raised before the CAVC below. In *Sims v. Apfel, supra,* this Court recognized the greater latitude accorded claimants in informal and non-adversarial proceedings. Specifically, the Court held that the judicially imposed requirement of issue exhaustion is inappropriate in the social security context because the parties have a non-adversarial relationship. "It is true that we have imposed an issue-exhaustion requirement even in the absence of a statute or regulation. But the reasons we have done so does not apply here. The basis for a judicially imposed issue exhaustion requirement is

an analogy to the rule that appellate courts will not consider arguments raised before trial courts." *Sims v. Apfel*, 120 S.Ct. at 2084.

The Court thus reasoned that in a non-adversarial system, the issue-exhaustion requirement was not necessary. "More generally, we have observed that it is well settled that there are wide differences between administrative agencies and courts, and we have thus warned against reflexively assimilating the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts." *Id.* at 2085.

Indeed, the import of this Court's holding and its application to the veterans adjudication system was recognized by the Federal Circuit in *Forshey v. Gober*, 2000 WL 1363714 (Fed. Cir.), *slip op.* at p. 3, wherein the court noted:

> [t]he Supreme Court's Sims rationale and articulation apply with equal, if not greater, force in this arena. The system for awarding veterans benefits is 'imbued with special beneficence' from a sovereign grateful to a 'special class of citizens, those who risked harm to serve and defend their country.' It is intended to be a 'nonadversarial, ex parte, paternalistic system,' that is 'uniquely pro-claimant.' It is, in short, or at least it ought to be, the antithesis of an adversarial formalistic dispute resolving apparatus. (Citations omitted).

Indeed, the Federal Circuit Panel in *Forshey* opined that while *Sims* involved court review of agency decisions and the Federal Circuit reviews Veterans Courts decisions, the distinction was of no consequence since the

Veterans Court is not a fact finding body like a district court and "the administrative decision of the board, to the extent we are concerned passes through the Veterans Court as a matter of law." *Forshey, slip op.* at p. 7. Consequently, the *Forshey* court held that it did have jurisdiction to review an issue that was not raised below.

Thus, in light of *Smith v. West, supra, Belcher* and *Forshey*, it is apparent that there is currently a significant difference of opinion in the Federal Circuit as to its jurisdiction to review issues that were not raised below. Therefore, the Petitioner requests that the Supreme Court resolve this issue in the veterans' favor by determining that the same reasoning followed by the Court in *Sims v. Apfel* applies equally, if not more so, to the review of statutes and regulations involving veterans' benefits decisions by the Court of Appeals for the Federal Circuit.

The historical lack of judicial review of the veterans' benefits adjudication system and the uniqueness of the system are illustrative of why the doctrine of issue exhaustion should play no part in this special system. Until 1988, when Congress enacted the Veteran's Judicial Review Act, the Veteran Administration stood in "splendid isolation as the single federal administrative agency whose major functions were explicitly isolated from judicial review." H.R. Rep. No. 100-963, 100th Cong., 2d Sess. 10, *reprinted in*, 1988 U.S.C.C.A.N. 5782, 5791. When the 1988 Act was finally passed, the final legislation contained five crucial components: previous preclusion of judicial review of veteran benefit entitlements was repealed; the United States Court of Veterans Appeals (now called the Court of Appeals for Veteran Claims or "CAVC") was created; the Board of Veterans' Appeals

(BVA) was retained as the final administrative decisional body with the Department of Veteran Affairs; a $10 attorney's fee cap was abolished; and most importantly for the issues discussed in this writ, an additional level of judicial review was created by allowing review of CAVC decisions by the Federal Circuit on certain narrow issues of law. *See*, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

The Federal Circuit has a vital role in judicial review of veteran claims. However, as a statistical matter, substantial appellate review for most cases ends at the CAVC. Since 1990, the CVA has disposed of over 10,000 cases. *See*, Prof. William A. Fox, *An Analysis of Jurisprudence, Organization, and Operation of the Newest Article One Court*, 2d ed. 182 (1998). In comparison, the Federal Circuit has issued full opinions on only a small number of its appeals on the merits. *Id.* One reason for the relatively small number of cases decided by the Federal Circuit on the merits is due to the Federal Circuit's limited jurisdiction. CAVC factual determinations are insulated from Federal Circuit review unless the facts implicate constitutional questions. *See*, 38 U.S.C. § 7292(d)(2).

Beyond Federal Circuit review, dissatisfied parties may petition the Supreme Court for writ of certiorari. However, in the ten years that the CAVC has been in existence, the Supreme Court has granted only one certiorari petition, *Brown v. Gardner*, 513 U.S. 115 (1994), a case involving large implications for the CAVC and Federal Circuit regarding the proper canons of construction for statutory and regulatory review. Thus, in all practicality to date, a veteran's last opportunity for judicial review of veteran benefits issues has been in the Federal Circuit. Such a practicality makes it quite clear that the

Federal Circuit's role is essential to ensure the veteran's statutory right to judicial review of the statutes and regulations of the Department of Veterans Affairs.

From its creation, the Veterans Administration's statutes and regulations had not been subjected to consistent judicial scrutiny. In essence, the VA was successful in avoiding consistent judicial review of the Agency's interpretations of their statutes and regulations and instead were able to rely upon their own interpretations. In 1988, Congress determined that the VA would no longer be insulated from judicial review and Congress expressly assigned the Court of Appeals for the Federal Circuit the responsibility for the interpretation of VA statutes and regulations, as well as constitutional claims. The Petitioner asserts that the doctrine of issue exhaustion is inappropriate in this non-adversarial arena. The Federal Circuit's jurisdiction should be interpreted to allow consideration of questions of law involving constitutional questions and issues of statutory and regulatory interpretation without those issues having necessarily been presented to the CAVC.

As such, when presented with any relevant issue of statutory interpretation, the Federal Circuit's jurisdiction should be implicated as contemplated by Congress. Declining judicial review of statutory interpretations based on an issue-exhaustion requirement does not serve this non-adversarial system, but instead serves to create an adversarial system that deprives a veteran of the judicial review provided for by Congress, because he failed to present the issue to the CAVC.

The sheer number of pro se claimants in the CAVC demonstrates why the doctrine of issue exhaustion is fundamentally inequitable. In 1999, 78% of the claimants appealing to the CAVC were pro se. (Fifth Judicial Conference, 12 Vet.App. XXVII, 1999). Thus, the majority of appellants before the CAVC are non-attorney litigants who are completely unaware of the issue exhaustion doctrine. Combined with the statutory limitation upon the Federal Circuit's jurisdiction by Congress to issues of statutory and regulatory interpretations or a constitutional issue a pro se appellant is effectively denied judicial review of a statutory or regulatory interpretation by the holding in *Smith* and *Belcher*. There is no statutory requirement for the presentation of issues of statutory and regulatory interpretation to the CAVC as a predicate to trigger the Federal Circuit's jurisdiction. This is a "judicially created" doctrine which should not be applied in veterans' law or used to limit even further the jurisdiction of the Federal Circuit. Issues of statutory and regulatory interpretations or constitutional issues will not be raised before the CAVC by pro se appellants. As a consequence of the *Smith* and *Belcher* decisions, judicial review will not be afforded pro se appellants.

Lastly, the doctrine of issue exhaustion is also inherently unfair in the veteran's benefits adjudication system due to the developing state of law. Because judicial review has only been in existence since 1988, the case law is constantly changing and creating new statutory and regulatory interpretations. This year alone, the Federal Circuit has reversed and remanded ten cases, thereby creating a new theory of law upon which to challenge the VA's wrongful denial of claims. Therefore, a legal theory

that supports the veteran's position may not have been available to the veteran at the time he was framing his issue before the CAVC or Agency. To deny the veteran judicial review by the Federal Circuit under the new state of law because of issue exhaustion is inherently unfair. The doctrine of issue exhaustion may make sense in the "normal" civil adjudication process wherein the state of law has been well settled for many years. But such a doctrine is nonsensical in a legal arena where the state of law is still being created and subject to change.

Finally, this Court's holding in *Sims* is consistent with 38 U.S.C. § 7292 – the Federal Circuit's jurisdictional statute.

38 U.S.C. § 7292 provides, in relevant part:

> (a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.
>
> (c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction

> to review and decide **any challenge** to the validity of any statute or regulation **or any interpretation thereof brought under this section,** and to interpret constitutional and statutory provisions, **to the extent presented and necessary to a decision.** The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.
>
> (d) The Court of Appeals for the Federal Circuit **shall decide all relevant questions of law,** including interpreting constitutional **and statutory provisions.**

(*Emphasis added*). In determining that it could not exercise jurisdiction over an issue of statutory interpretation not explicitly raised before and relied upon by the CAVC, the Federal Circuit in *Belcher*, focused **only** on 38 U.S.C. § 7292(a) which provides that a party may obtain review of the decision with respect to a statutory interpretation relied upon by the CAVC. However, the Panel failed to acknowledge the other relevant provisions of 38 U.S.C. § 7292, and consequently misinterpreted its own jurisdiction.

The plain language of 38 U.S.C. § 7292(c) provides that the Federal Circuit **shall** have jurisdiction to decide **any** statutory interpretation to the extent presented and necessary to a decision. Further, 38 U.S.C. § 7292(d) provides that the Federal Circuit **shall** decide **all relevant questions of law.** Neither provision requires that the question of law or statutory provision was relied upon below by the CAVC.

The plain language of 38 U.S.C. § 7292 requires the Federal Circuit to exercise its jurisdiction over statutory interpretations even if such issues were not explicitly raised below to the CAVC. Even if there were some question as to whether one provision seems to allow for jurisdiction over statutory interpretations not relied upon by the CAVC below, and one provision disallowing jurisdiction over such issues, the statute must be interpreted in the veteran's favor for allowance of jurisdiction. Courts must "ultimately" read statutory provisions in a veteran's favor. *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221 (1991) (*emphasis added*). The canons of statutory construction of veteran benefits laws require that the provisions be construed in the beneficiaries' favor. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). *See also Brown v. Gardner*, 513 U.S. 115, 117-118 (1994).

Thus, if 38 U.S.C. § 7292 is construed in the veteran's favor, it must be interpreted to require Federal Circuit jurisdiction issues of statutory interpretation even if such issues were not raised below.

CONCLUSION

Because of the Federal Circuit's conflicting holdings in *Forshey* and *Smith, supra,* and *Belcher* the question of law regarding the Federal Circuit's jurisdiction is clearly unsettled and a veteran has no way of knowing whether his appeal will be reviewed or dismissed. Thus, on the basis of this conflict of law, as well as the Court's recent holding in *Sims v. Apfel,* the Petitioner respectfully

requests the Court to instruct the Federal Circuit regarding its jurisdiction over issues of statutory interpretation that are not raised below.

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals for the Federal Circuit

99-7172

ROBERT S. BELCHER,

Claimant-Appellant,

v.

TOGO D. WEST, JR.,
Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: June 16, 2000

Before LOURIE, CLEVENGER, BRYSON, *Circuit Judges*.

CLEVENGER, *Circuit Judge*.

Robert S. Belcher appeals the judgment of the United States Court of Appeals for Veterans Claims, which affirmed a Board of Veterans' Appeals decision denying Mr. Belcher's claim for benefits based on a psychiatric disability. *See Belcher v. West*, No. 97-1374, slip op. at 8, 1999. We dismiss the appeal for lack of jurisdiction.

I

Mr. Belcher served on active duty in the United States Navy from July 1943 to April 1944. While on active duty, Mr. Belcher was hospitalized in a psychiatric ward, where an examination report noted him to be hostile, withdrawn, and "seclusive," with persistent auditory and visual hallucinations. Mr. Belcher reported to his treating doctors that his hallucinations had begun when he was

about 15 years old, when he had experienced significant personal trauma. A series of psychiatric diagnoses identified Mr. Belcher's condition as, alternatively, schizophrenia, mental deficiency, or "psychosis with mental deficiency." Prior to his discharge, a Medical Evaluation Board ("MEB") concluded that Mr. Belcher's condition pre-existed his service in the Navy.

Since his discharge from the Navy over fifty years ago, Mr. Belcher has unsuccessfully sought benefits for his psychiatric disability based on his military service. Mr. Belcher's most recent effort began in 1992, when he filed a claim for service connection for a nervous condition. An appeal to the Board of Veterans' Appeals in 1996 resulted in an examination by a Department of Veterans Affairs physician, who concluded that Mr. Belcher was indeed suffering from a current psychiatric disorder, and that the disorder appeared at about age 15, before Mr. Belcher's service in the Navy. A regional office of the Department of Veterans Affairs concluded that Mr. Belcher's condition was not aggravated by his service and denied service connection. The Board of Veterans' Appeals affirmed.

The Court of Appeals for Veterans Claims concluded that Mr. Belcher had presented a well-grounded claim for service connection, but that his claim failed on its merits. That court, reviewing the evidence in the record, noted multiple diagnoses of Mr. Belcher pinpointing the onset of his disorder well before his entry into the Navy. The court determined that this evidence outweighed the lay statements of his family and friends in the record and provided "clear and unmistakable evidence" sufficient to overcome the statutory presumption of soundness

extended to all veterans. The court then held that there was insufficient evidence in the record to conclude that Mr. Belcher's condition worsened while in the Navy. Accordingly, the court affirmed the Board of Veterans' Appeals denial of service connection. Mr. Belcher now appeals from that decision.

II

On appeal, Mr. Belcher's primary argument is that the Court of Appeals for Veterans Claims failed to follow the dictates of 38 C.F.R. § 3.304(b)(3) by allowing medical diagnoses based on Mr. Belcher's own statements to form the basis of the denial of service connection. That is, section 3.304(b)(3) provides that:

> Signed statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest is of no force and effect if other data do not establish the fact.

Mr. Belcher argues that, when properly interpreted, section 3.304(b)(3) prohibits the use of medical evaluations and diagnoses, where the conclusions of such examinations are based even upon *oral* statements made by the veteran "relating to the origin, or incurrence of any disease or injury." Thus, Mr. Belcher argues that the multiple diagnoses placing the onset of his disorder at the age of 15, as based on his statements to that effect, cannot be used to overcome the statutory presumption of soundness established by 38 U.S.C. § 1111 (1994). Mr. Belcher

faults the Court of Appeals for Veterans Claims for having failed to appreciate and accept this argument based on section 3.304(b)(3).

This argument, however, suffers from a fatal jurisdictional flaw. At oral argument, counsel for Mr. Belcher forthrightly admitted that the section 3.304(b)(3) argument had not been presented to the Court of Appeals for Veterans Claims. Our jurisdiction over this case is provided by 38 U.S.C. § 7292(a) (Supp. 1999), *see Maggitt v. West*, 202 F.3d 1370, 1374 (Fed. Cir. 2000), *Glover v. West*, 185 F.3d 1328, 1331 (Fed. Cir. 1999), *Bailey v. West*, 160 F.3d 1360, 1362 (Fed. Cir. 1998) (*en banc*), which states in relevant part (emphasis added):

> After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) *that was relied on by the Court in making the decision*.

This court has held that section 7292 is a jurisdictional bar to our consideration of a legal issue or argument (one directed to the validity or interpretation of a statute or regulation) on appeal absent at least one of two conditions: (1) the Court of Appeals for Veterans Claims *addressed* the issue or argument, or (2) the issue or argument was *raised* by a party to the Court of Appeals for Veterans Claims. *See Smith v. West*, No. 99-7133, slip op. at 4 (Fed. Cir. 2000); *Linville v. West*, 165 F.3d 1382, 1384 (Fed. Cir. 1999). We reasoned that where the Court of Appeals for Veterans Claims neither addresses a legal

issue nor has such an issue presented to it, that court cannot be said to have "relied on" the issue or argument "in making its decision." 38 U.S.C. § 7292(a); *see Smith*, No. 99-7133, slip op. at 4 (legal issues not presented or addressed below lack jurisdiction on appeal); *cf. Linville*, 165 F.3d at 1384-85 (holding that legal issues presented to the Court of Appeals for Veterans Claims are "relied on" by that court, even if silently rejected or ignored).

The Supreme Court's recent decision in *Sims v. Apfel*, 530 U.S. ___, 2000 WL 712806 (2000), is not to the contrary. In *Sims*, the Court considered the issue exhaustion requirement for appeals from the Social Security Appeals Council, when no statute or regulation addressed the issue. *See* 2000 WL 712806*3-4 ("Here, the Commissioner does not contend that any statute requires issue exhaustion in the request for review. . . . SSA regulations do not require issue exhaustion."). In contrast, 38 U.S.C. § 7292(a) speaks directly to the requirement of issue exhaustion. *See Smith*, No. 99-7133, slip op. at 4; *Maggitt*, 202 F.3d at 1374; *Linville*, 165 F.3d at 1384. Furthermore, *Sims* deals with review of an agency decision by a court, as opposed to this case, which considers our review of another court's judgment. *See* 38 U.S.C. § 7251 (Supp. 2000) ("There is hereby established . . . a court of record to be known as the United States Court of Appeals for Veterans Claims.").

In this case, Mr. Belcher's 38 C.F.R. § 3.304(b)(3) issue was not addressed by or presented to the Court of Appeals for Veterans Claims. Accordingly, we are without jurisdiction to consider it. *See Smith*, No. 99-7133, slip op. at 4 (no jurisdiction over issues not addressed or raised

below); *cf. Linville*, 165 F.3d at 1385 (jurisdiction to consider issue properly raised below).[1]

III

Having been required to set aside Mr. Belcher's primary argument on appeal, we turn to his remaining arguments. To the extent he raises additional arguments, Mr. Belcher simply argues that the Court of Appeals for Veterans Claims incorrectly determined that the evidence provided "clear and unmistakable evidence" rebutting the presumption that he entered the Navy in sound condition. *See* 38 U.S.C. § 1111 (1994) ("[E]very veteran shall be taken to have been in sound condition when examined, accepted or enrolled for service except . . . where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service."). But whether the evidence regarding Mr. Belcher's pre-existing condition rises to the level of "clear and unmistakable evidence" is simply the application of the facts to the legal standard established by section 1111, an issue that we are without jurisdiction to consider. *See* 38 U.S.C. § 7292(d)(2) ("[T]he Court of Appeals [for the Federal Circuit] may not review . . . a challenge to a law or regulation as applied to the facts of a particular case."); *Harris v. West*, 203 F.3d 1347, 1350 (Fed. Cir. 2000). Thus, we must dismiss his appeal.

---

[1] We note in passing that our holding here is based on the precise statutory language of 38 U.S.C. § 7292 and obviously does not pertain to our jurisdiction to hear arguments in cases where our jurisdiction is not provided by section 7292.

IV

Mr. Belcher's primary argument on appeal was not presented to the Court of Appeals for Veterans Claims and cannot now be raised. His remaining arguments simply challenge the application of the facts of his case to the established law of 38 U.S.C. § 1111, a question that we are without power to review. Accordingly, Mr. Belcher's appeal is dismissed.

COSTS

No costs.

DISMISSED

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 97-1374

ROBERT S. BELCHER, APPELLANT,

v.

TOGO D. WEST, JR.,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to US. Vet. App. R. 28(i), this action may not be cited as precedent.

GREENE, *Judge:* Veteran Robert S. Belcher appeals a May 1997 Board of Veterans' Appeals (Board) decision denying service connection for a psychiatric disability. The Court has jurisdiction over the case under 38 U.S.C. § 7252(a). Summary disposition is appropriate. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the decision of the Board.

I. FACTS

The appellant served on active duty in the U.S. Navy from July 1943 to April 1944. Record (R.) at 13. His entry medical examination report notes no psychiatric disability. R. at 12-15. In December 1943, he was apprehended for unauthorized absence. R. at 25. During a medical evaluation prior to being confined, he complained of nervousness, night-phobia, feelings of persecution, and seeing visions. *Id.* Upon transfer to the base psychiatric

ward, an examination report noted him to be hostile, withdrawn, and seclusive, with persistent auditory and visual hallucinations. R. at 27-29. While hospitalized, he reported that his hallucinations had begun when he was about 15 years old after he witnessed the murder of his uncle. R. at 27-35. The initial diagnosis was simple schizophrenia with mental deficiency, which was changed to dementia praecox. "Dementia praecox" is a term formerly used to describe schizophrenia as a single entity. STEDMAN'S MEDICAL DICTIONARY 454 (26th ed. 1995). His record was annotated that his condition existed prior to enlistment (R. at 30) but after taking his history, the examining physician noted: "Because of his psychotic manifestations and lack of understanding, he is not considered competent to sign a statement concerning existence prior to enlistment." R. at 32. In January 1944, he was transferred to Bethesda Naval Hospital. The impression was "mental deficiency, moron – the episodic confusional state was undoubtedly more or less situational and is what might be expected in a person of low intelligence endeavoring to adjust to a complicated situation." R. at 35. His diagnosis was changed from dementia praecox to "psychosis with other disability (mental deficiency)." R. at 37.

A medical evaluation board (MEB) concluded that the appellant was "basically a mental defective and has recently passed through an acute transient psychotic episode but is now functioning at his pre-induction level," and it recommended that he be discharged from service. R. at 41-44. The MEB also concluded that the appellant's condition pre-existed service. R. at 44. He was discharged in April 1944. R. at 37.

In April 1949, the appellant applied for service connection for a "nervous breakdown." R. at 47-50. Dr. A.F. Ritchey, a VA neuropsychiatrist, found him to be of low intelligence, with a moderate amount of tension and anxiety. R. at 52-60. Dr. Ritchey opined, "There is no evidence of psychosis now." R. at 56. He noted that the appellant had suffered "an emotional disturbance since childhood which was aggravated by service so that a psychosis resulted. It is felt that he has now returned to his pre-war emotional level." R. at 57. An August 1949 regional office (RO) decision denied his claim on the basis that his mental deficiency was a developmental defect. R. at 65.

In October 1954, the appellant sought to reopen his claim and also sought service connection for tuberculosis. R. at 371-74. Private medical records of treatment for tuberculosis were submitted. R. at 69, 71. The RO denied the tuberculosis claim but was silent on the claim for a mental disability. R. at 378.

In April 1986, the appellant had a VA psychiatric examination following a complaint of "a bad case of nerves." R. at 92-94. He was diagnosed as suffering from generalized anxiety disorder. R. at 94. In June 1986, the RO granted the appellant a pension on the basis of tuberculosis, but denied reopening the claim for a psychiatric disability. R. at 384-85.

In 1987, the appellant was informed that his pension would be reduced because the Social Security income he was receiving exceeded the statutory limit for his pension benefits. R. at 387. In November 1988, a VA physician diagnosed him as suffering with generalized anxiety disorder. R. at 210.

In March 1992, the appellant filed a claim for service connection for a nervous condition and stated that he had been treated over the years at VA Medical Centers in Brecksville, Ohio, and Phoenix, Arizona. R. at 103. The RO responded that to reopen his claim he needed to submit new and material evidence. R. at 105. It also informed him that the Brecksville records were already of record and that the Phoenix records "would have no evidentiary value." R. at 105. In March 1993, he requested to reopen his claim for service connection for a "nervous breakdown" stating he had been treated at Bethesda Naval Hospital. R. at 110. The RO responded that the Bethesda records had already been considered in the prior denial and that he needed to submit new and material evidence showing incurrence or aggravation while on active duty or within one year of discharge. R. at 112. The appellant submitted four lay statements dated. June 1993, all to the effect that he had nothing physically or mentally wrong with him prior to going into the service. R. at 114-17. The RO confirmed the previous denial of the claim on the basis that he had had an acute psychotic episode in service, which fully resolved without residuals. R. at 121-23.

In September 1993, the appellant filed a Notice of Disagreement (R. at 132-33), the RO issued a Statement of the Case (R. at 135-42), and he appealed to the Board (R. at 144). An April 1994 VA medical examination reported a diagnostic impression of a history of anxiety disorder, rule out dysthymia. R. at 152. In February 1996, the Board remanded the matter to the RO for further development followed by a determination of whether new and material evidence had been presented or secured. R. at 299-302.

During a March 1996 VA compensation and pension examination, Dr. Malina Acharya evaluated the appellant for a mental disorder. R. at 327. Dr. Acharya diagnosed him as suffering from "[a]nxiety disorder, not otherwise specified. Dysthymia." R. at 328. The RO determined that the examination was inadequate for rating purposes because Dr. Acharya did not address the issues of etiology and date of onset and there was no indication that she reviewed his service medical records (SMRs) or his claims folder. R. at 336. Dr. Acharya's July 1996 addendum to the previous medical examination was not responsive to the RO's concerns. R. at 332-34. The RO determined that the examination was still inadequate and requested another examination. R. at 342. In October 1996 another VA physician reviewed the file and opined that the appellant's neurosis, by subjective complaint, appeared at about age 15 and by documented objective assessment, it was identified in 1949. R. at 338-41. He noted that a psychosis appeared briefly in 1944 and resolved itself in a matter of weeks. *Id.* The physician believed the etiology for the psychosis was likely the presence of anxiety and limited coping skills. R. at 340. Noting a lack of treatment for a mental disorder for the past 40 years, the examiner noted that a moderate level of anxiety does not drive many people to seek treatment. "By 1986, the anxiety was evaluated as generalized and treatment was obtained in 1988. Lack of treatment cannot, of course, prove that a condition did not exist." *Id.*

The RO denied the claim on the basis that there was no evidence that the appellant's preexisting condition had been aggravated by service and issued a supplemental SOC. R. at 344-54. The Board expressly found that new

and material evidence had been submitted to reopen the claim. R. at 6. However, the Board denied the claim on the merits finding that the appellant's preexisting condition was not aggravated during service. This appeal followed.

The appellant argues (1) that the Board did not properly accord him the presumption of soundness and did not develop clear and unmistakable evidence to rebut that presumption, (2) that he was never notified of any of the prior denials of his claims and, therefore, had no duty to provide new and material evidence to reopen, and (3) that VA failed in the duty to assist him by not giving him an adequate contemporaneous medical examination and not obtaining his Social Security records. He also contends that the Board failed to consider his statements that he did not have a preexisting condition.

The Secretary responds that the claim was not well grounded, arguing that there is no medical nexus evidence that the appellant's preservice neurosis underwent a permanent increase in severity during service. Alternatively, he argues that there is clear and unmistakable evidence that the appellant had a preexisting condition, which rebutted the presumption of soundness, and that the condition was not aggravated by service. He argues that the examinations given by the RO, taken all together, were adequate for rating purposes and that it was harmless error for VA not to get the appellant's Social Security records, because, based on the appellant's own representations, no other relevant medical records were available.

II. APPLICABLE LAW AND ANALYSIS

A. Well-Grounded Claim

A veteran filing a claim for VA benefits has "the burden of submitting evidence sufficient to justify a belief by a fair and impartial individual that the claim is well grounded." 38 U.S.C. § 5107(a); *see Carbino v. Gober*, 10 Vet.App. 507, 509 (1997). The determination of whether a claim is well grounded is a matter that this Court reviews de novo. *See* 38 U.S.C. § 7261(a)(1); *Robinette v. Brown*, 8 Vet.App. 69, 74 (1995). The Court has held that a claim must be accompanied by supportive evidence and that such evidence "must 'justify a belief by a fair and impartial individual' that the claim is plausible." *Tirpak v. Derwinski*, 2 Vet.App. 609, 611 (1992) (quoting 38 U.S.C. § 5107). A well-grounded claim generally requires (1) medical evidence of a current disability; (2) medical or, in certain circumstances, lay evidence of incurrence or aggravation of a disease or injury in service; and (3) medical evidence of a nexus between an in-service injury of disease and the current disability. *See Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table); *see also Epps v. Gober*, 126 F.3d 1464, 1468 (Fed. Cir. 1997); *Carbino, supra*. Where the determinative issue involves medical causation, competent medical evidence is required for the claim to be well grounded. *See Grivois v. Brown*, 6 Vet.App. 136 (1994). This burden may not be met by presenting lay testimony. Lay persons are not competent to offer medical opinions. *See Ruiz v. Gober*, 10 Vet.App. 352, 356 (1997); *Grivois, supra*.

The appellant has met the threshold requirements of a well-grounded claim. He has a current diagnosis of an

anxiety disorder and there is evidence of an in-service incurrence. Dr. Ritchey's 1949 examination links his episode in service with his mental and emotional disturbance. Therefore, the Court finds on de novo review that the appellant's claim is well grounded.

B. Presumptions of Soundness and Aggravation

Generally, veterans are presumed to have entered service in sound condition if no disability was detected during an entry examination. *See* 38 U.S.C. § 1111; 38 C.F.R. § 3.304(b) (1997); *Doran v. Brown*, 6 Vet.App. 283, 286 (1994); *Bagby v. Derwinski*, 1 Vet.App. 225, 227 (1991). This presumption may be rebutted by a showing of clear and unmistakable evidence that an injury or disease existed prior to service. *See* 38 C.F.R. § 3.304(b). Whether sufficient evidence exists to rebut this presumption is a legal determination subject to de novo review by this Court. *Bagby*, 1 Vet.App. at 227 (citations omitted). Here, although the appellant's entrance examination noted no psychiatric abnormalities, during service he reported that he had had his onset of "nervousness" at age 15. Additionally, the Navy physicians that examined him at the time of his episode, the MEB, the VA physician in 1949, and another VA physician in 1996, after review of his SMRs and claims file, all concluded that the appellant's condition pre-existed service. Although he submitted four statements from family and friends attesting that he had no mental defects before entering service, these statements are from laypersons, who are not competent to offer medical opinions. *See Ruiz* and *Grivois*, both *supra*. Based on the evidence of record, the Court holds that the presumption of soundness was rebutted by clear and

unmistakable evidence that the appellant's condition existed prior to his entry in service.

"If a disability is found to have preexisted service, then service connection may be predicated only upon a finding of aggravation during service." *Paulson v. Brown*, 7 Vet.App. 466, 468 (1995). Under 38 U.S.C. § 1153:

> A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progression of the disease.

See also 38 C.F.R. § 3.306(a)-(b) (1997). The presumption of aggravation is applicable only if the preservice disability underwent an increase in severity during service. *See Hunt v. Derwinski*, 1 Vet.App. 292, 296 (1991). "[T]emporary or intermittent flare-ups during service of a preexisting injury or disease are not sufficient to be considered 'aggravation in service' unless the underlying condition . . . is worsened." *Hunt*, 1 Vet.App. at 297. The determination of whether a preexisting disability was aggravated by service is a question of fact, which the Court reviews under the "clearly erroneous" standard. *See Doran*, 6 Vet.App. at 286-87. Here, the Board concluded that the appellant's mental condition did not increase in severity while in service. Further, the record discloses that at discharge from service, the appellant was "functioning at his pre-induction level." In 1949, a neuropsychiatrist noted that there was " no evidence of psychosis-now" and that he had returned to his preservice emotional level. In 1996, an examiner noted that the

episode in 1944 had resolved itself within weeks. Accordingly, the Court holds there was a plausible basis for the Board's conclusion that the appellant's disorder was not aggravated in service. Consequently, the Board did not err in finding that the appellant's mental condition was not service connected.

C. Presumption of Regularity

The appellant argues that he never received notification of any of VA's prior denials of his claims. A review of the record of appeal reveals no evidence that notification was not mailed to the appellant or that any correspondence was returned to VA as undeliverable. It is well settled that "clear evidence to the contrary" is required to rebut the presumption of regularity, i.e., the presumption that notice was sent in the regular course of government action. *See Schoolman v West*, ___ Vet.App. ___, No. 97-1494, slip op. at 5-6 (April 2, 1999); *YT v. Brown*, 9 Vet.App. 195, 199 (1996); *see also Mason v. Brown*, 8 Vet.App. 44, 53 (1995); *Ashley v. Derwinski*, 2 Vet.App. 62, 64-65, *aff'd on reconsideration*, 2 Vet.App. 307 (1992). The "appellant's statement of nonreceipt does not by itself constitute the type of clear evidence needed to rebut the presumption of regularity that the notice was sent." *See Schoolman*, ___ Vet.App. ___, slip op. at 6.

D. Social Security Records

The Court notes that VA was on notice that the appellant was receiving Social Security Administration (SSA) benefits. R. at 387. The record does not reveal that these records were ever requested. "When VA is put on

notice prior to the issuance of a final decision of the possible existence of certain records *and their relevance*, the BVA must seek to obtain those records." *Hayes v. Brown*, 9 Vet.App. 67, 73-74 (1996) (quoting *Murincsak v. Derwinski*, 2 Vet.App. 363, 373 (1992)) (emphasis added). In *Gobber v. Derwinski*, this Court held that the duty to assist "is limited to specifically identified documents that by their description would be facially relevant and material to the claim." 2 Vet.App. 470, 472 (1992). The appellant has not offered any indication as to what relevance his SSA records might have as to whether his anxiety disorder was incurred in or aggravated during service. The Court holds, therefore, that the Secretary's failure to obtain the appellant's SSA records did not violate his duty to assist pursuant to 5107(a).

III. CONCLUSION

After consideration of the pleadings and a review of the record, the Court holds that the appellant has not demonstrated that the Board committed either legal or factual error that would warrant reversal or remand. The Court is also satisfied that the Board decision fulfills the "reasons or bases" requirements of 38 U.S.C. § 7104(d)(1). *See Gilbert v. Derwinski*, 1 Vet.App. 49 (1990). The decision of the Board is AFFIRMED.

DATED: May 14, 1999

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United States Court of Appeals
for the Federal Circuit

99-7172

ROBERT S. BELCHER,

Claimant-Appellant,

v.

HERSHEL W. GOBER,
Acting Secretary of Veterans Affairs,

Respondent-Appellee.

ORDER

(Filed Aug. 21, 2000)

A combined petition for panel rehearing and rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service.

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 28, 2000.

FOR THE COURT,

/s/ Jan Horbaly (AN)
Jan Horbaly
Clerk

Dated: August 21, 2000

cc: Kenneth M. Carpenter
Lauren S. Moore

BELCHER V DVA, 99-7172
(CVA – 97-1374)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

Supreme Court, U.S.
FILED
JAN 8 2001
OFFICE OF THE CLERK

(2) (2)

Nos. 00-739 and 00-754

In the Supreme Court of the United States

ROBERT S. BELCHER, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

RUSSELL E. SMITH, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether, under 38 U.S.C. 7292, the United States Court of Appeals for the Federal Circuit has jurisdiction over an appeal from the denial of a claim for veterans' benefits when the claimant's appeal is based on statutes and regulations that were not presented to, or relied upon by, the Court of Appeals for Veterans Claims.

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In the Supreme Court of the United States

No. 00-739

ROBERT S. BELCHER, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

No. 00-754

RUSSELL E. SMITH, PETITIONER

v.

HERSHEL W. GOBER,
ACTING SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 00-739 (00-739 Pet. App. 1-7) is reported at 214 F.3d 1335, and its opinion in No. 00-754 (00-754 Pet. App. 1-8) is reported at 214 F.3d 1331. The opinion of the Court of Appeals for Veterans Affairs in No. 00-739 (00-739 Pet. App. 8-

19) is unreported, and its opinion in No. 00-754 (00-754 Pet. App. 9-17) is reported at 12 Vet. App. 312.

JURISDICTION

The judgment of the court of appeals in No. 00-739 was entered on June 16, 2000. The petition for rehearing was denied on August 21, 2000. The judgment of the court of appeals in No. 00-754 was entered on June 13, 2000. The petition for rehearing was denied on August 16, 2000. The petitions for a writ of certiorari in both No. 00-739 and No. 00-754 were filed on November 7, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7292(a) provides that "[a]fter a decision of the United States Court of Veterans Appeals is entered in a case, any party to the case may obtain a review of the decision with respect to the validity of any statute or regulation * * * or any interpretation thereof * * * that was relied on by the Court in making the decision." 38 U.S.C. 7292(a) (1994 & Supp. IV 1998). This review is available only in the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292(c). The Federal Circuit held that Section 7292(a) did not authorize jurisdiction over the appeal of petitioner in No. 00-739 or the appeal of petitioner in No. 00-754 because the petitioners' arguments invoked statutes and regulations that were neither raised before the United States Court of Veterans Appeals (Veterans Court) nor relied on by the Veterans Court in reaching its decisions. 00-739 Pet. App. 7; 00-754 Pet. App. 8. Because the two petitions present the same question regarding the Federal Circuit's application of 38 U.S.C. 7292(a), the government consolidates its response to the two petitions.

2. a. Robert Belcher, petitioner in No. 00-739, served in the United States Navy from July 1943 to April 1944. 00-739 Pet. App. 1. In 1996, the Board of Veterans Appeals (BVA) denied Belcher's claim for benefits based on an alleged psychiatric disability, finding that the psychiatric condition predated Belcher's military service and was not aggravated by that service. *Id.* at 13. Belcher appealed that decision and the Veterans Court affirmed, holding that the Secretary of Veterans Affairs (VA) established by "clear and unmistakable evidence" that the psychiatric condition predated service and was not aggravated by service. *Id.* at 15-16.

b. Belcher then appealed to the Federal Circuit, arguing that the Veterans Court decision violated 38 C.F.R. 3.304(b)(3), which provides that "[s]igned statements of veterans relating to the origin, or incurrence of any disease or injury made in service if against his or her own interest [are] of no force and effect if other data do not establish the fact." Belcher contended that this regulation also prohibited the Veterans Court from considering 1944 "medical evaluations and diagnoses, where the conclusions of such examinations are based even upon *oral* statements by the veteran 'relating to the origin, or incurrence of any disease or injury.'" 00-739 Pet. App. 3 (emphasis in original). At oral argument, counsel for Belcher admitted that the Section 3.304(b)(3) argument had not been presented to the Veterans Court. *Id.* at 4.

The Federal Circuit noted that its jurisdiction is limited to a review of Veterans Court decisions "with respect to the validity of any statute or regulation . . . or any interpretation thereof . . . *that was relied on by the Court in making the decision.*" 00-739 Pet. App. 4 (quoting 38 U.S.C. 7292(a) (1994 & Supp. IV 1998)).

The court cited its decision a few days earlier in *Smith* v. *West*, 214 F.3d 1331 (Fed. Cir. 2000) (the decision in No. 00-754 discussed *infra*), in explaining that "where the Court of Appeals for Veterans Claims neither addresses a legal issue nor has such an issue presented to it, that court cannot be said to have 'relied on' this issue or argument 'in making its decision,'" 00-739 Pet. App. 4-5 (quoting 38 U.S.C. 7292(a) (1994 & Supp. IV 1998)) (citing *Smith* v. *West*, 214 F.3d 1331 (Fed. Cir. 2000); *Linville* v. *West*, 165 F.3d 1382, 1384-1385 (Fed. Cir. 1999)). Therefore, because "Mr. Belcher's 38 C.F.R. § 3.304(b)(3) issue was not addressed by or presented to the Court of Appeals for Veterans Claims," the Federal Circuit held that it was "without jurisdiction to consider it." 00-739 Pet. App. 5.

The Federal Circuit explained that this Court's recent decision in *Sims* v. *Apfel*, 120 S. Ct. 2080 (2000), which rejected a judicially-crafted issue exhaustion requirement in appeals of Social Security administrative decisions, did not affect the application of 38 U.S.C. 7292 (1994 & Supp. IV 1998). 00-739 Pet. App. 5. The Federal Circuit noted that *Sims* made clear that it did not cast doubt on statutory issue exhaustion and "38 U.S.C. § 7292(a) speaks directly to the requirement of issue exhaustion." *Ibid.* The Federal Circuit further distinguished *Sims*, noting that "*Sims* deals with review of an agency decision by a court, as opposed to this case, which considers our review of another court's judgment." *Ibid.* (citing 38 U.S.C. 7251 (1994 & Supp. IV 1998)).

3. a. Russell Smith, petitioner in No. 00-754, served in the Marine Corps for three months in 1946 and the Army for fifteen months in 1950 and 1951. Smith appealed a decision of the BVA that denied his most recent request for service-connected disability benefits.

00-754 Pet. App. 1-2. The BVA concluded that petitioner failed to provide new and material evidence in support of his attempt to reopen earlier proceedings. *Id.* at 9. The Veterans Court affirmed the BVA, holding that the BVA did not clearly err in finding the newly submitted evidence merely cumulative. *Id.* at 16.

b. In his appeal to the Federal Circuit, Smith argued that the VA misconstrued 38 U.S.C. 5103(a), which provides that "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." Smith contended that this provision required the VA to inform him "as to what would constitute 'new and material evidence'" and the failure to do so violated Smith's due process rights. 00-754 Pet. App. 3. This argument, however, was "never raised nor addressed in the Court of Appeals for Veteran Claims." *Id.* at 6.

The Federal Circuit noted that its jurisdiction to hear appeals from the Veterans Court is "highly circumscribed" under 38 U.S.C. 7292. 00-754 Pet. App. 2. "Compliance with the jurisdictional statute requires that the issue raised on appeal be one of validity or interpretation that the veterans court expressly or impliedly addressed." *Id.* at 4. Thus, as the Federal Circuit had explained previously in *Boggs* v. *West*, 188 F.3d 1335, 1338 (Fed. Cir. 1999), a claimant has "no statutory right of appeal over an issue" that was neither raised nor addressed below. 00-754 Pet. App. 5. Accordingly, the court dismissed Smith's appeal for lack of jurisdiction.[1] *Id.* at 8.

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[1] The court added that Smith's statutory argument was directly "raised and rejected" in *McKnight* v. *Gober*, 131 F.3d 1483

ARGUMENT

The Federal Circuit's decisions are correct and do not conflict with any decision of this Court. Moreover, any tension between these decisions and another decision of the Federal Circuit should be addressed by the Federal Circuit *en banc*, where a petition for *en banc* review filed by the government in that other case is now pending. Review by this court is unwarranted.

1. The Federal Circuit has limited jurisdiction to review decisions of the Veterans Court. As petitioners note, until 1988 there was no judicial review of VA benefits decisions. See 00-739 Pet. 8; 00-754 Pet. 8. The Veteran's Judicial Review Act of 1988 created the United States Court of Veterans Appeals, *ibid.*, and in 38 U.S.C. 7292 authorized a further, "highly circumscribed" layer of judicial review in the Federal Circuit. 00-754 Pet. App. 2. Under Section 7292(a), the Federal Circuit may review Veterans Court decisions only "with respect to the validity of any statute or regulation * * * or any interpretation thereof (other than a determination as to a factual matter) that was *relied on* by the [Veterans] Court in making the decision." 38 U.S.C. 7292(a) (1994 & Supp. IV 1998) (emphasis added). Thus, there is no Federal Circuit review of factual issues or the application of the law to the facts. And the Federal Circuit's review of legal issues is expressly limited to challenges to the validity or interpretation of statutes and regulations that the Veterans Court relied on in making its decision. Section 7292(d) repeats this clear jurisdictional limitation: The Federal Circuit "shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determina-

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(Fed. Cir. 1997), and thus Smith's appeal ran "dangerously close to bringing a frivolous appeal." 00-754 Pet. App. 6-7.

tion as to a factual matter) *that was relied upon in the decision of the Court of Veterans Appeals*." 38 U.S.C. 7292(d) (1994 & Supp. IV 1998) (emphasis added). Thus, in dismissing petitioners' appeals, the Federal Circuit followed Congress's unambiguous intent that the court had jurisdiction to review only those statutes and regulations that the Veterans Court relied on below.

Petitioners do not dispute the fact that the Veterans Court did not rely on the statutes and regulations that formed the basis for petitioners' later appeals to the Federal Circuit. Nor do petitioners contest the Federal Circuit's reading of Section 7292(a)'s plain language. Instead, petitioners argue that other subsections of 38 U.S.C. 7292 expand the Federal Circuit's jurisdiction beyond that provided in Section 7292(a). 00-739 Pet. 13-14; 00-754 Pet. 13-14.[2]

Petitioners' argument ignores the plain language and the structure of 38 U.S.C. 7292. Petitioners highlight the inclusion of the word "any" in Section 7292(c). 00-739 Pet. 13-14; 00-754 Pet. 13-14. But Section 7292(c) is

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[2] This interpretation was not offered before the Federal Circuit, even though petitioner Smith had notice of the Secretary's jurisdictional challenge. See 00-754 Pet. App. 4. The Supreme Court too follows the traditional appellate requirement of issue exhaustion that Congress codified with respect to the Federal Circuit's review of Veterans Court decisions in 38 U.S.C. 7292: "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Thus, absent any special circumstances, petitioners' interpretation of 38 U.S.C. 7292 is not properly before the Court with respect to the petition in No. 00-754.

In Belcher's case, the Federal Circuit raised the jurisdictional issue *sua sponte*, so it is less certain that the Supreme Court's issue exhaustion requirement is implicated.

the provision providing exclusive jurisdiction in the Federal Circuit, as opposed to other courts of appeals, over appeals from decisions of the Veterans Court. The expansive language ensures that *any* appeal authorized under Section 7292(a) is brought in the Federal Circuit. Section 7292(c) makes this quite clear: it states that the Federal Circuit has exclusive jurisdiction over any challenge "*brought under this section*," thus referencing the right of review that Section 7292(a) grants. 38 U.S.C. 7292(a) (1994 & Supp. IV 1998) (emphasis added). Section 7292(c) does not provide a party with additional statutory rights of review.

Petitioners also cite language in Section 7292(d) directing that the Federal Circuit "shall decide all relevant questions of law" (00-739 Pet. 13; 00-754 Pet. 13), but omit the following sentence that reinforces Section 7292(a)'s limitation of the Federal Circuit's authority to review of statutes and regulations that were "relied upon in the decision of the Court of Veterans Appeals." 00-739 Pet. 13; 00-754 Pet. 13. 38 U.S.C. 7292(d) (1994 & Supp. IV 1998). Thus, the provisions cited by petitioners actually confirm that Section 7292(a), the only provision granting a party a right of review, limits that review to statutes and regulations that the Veterans Court relied on below. 38 U.S.C. 7292(a) (1994 & Supp. IV 1998).

2. This Court's decision in *Sims* v. *Apfel*, 120 S. Ct. 2080 (2000), upon which petitioners rely (00-739 Pet. 8; 00-754 Pet. 8), provides no support for their position for two reasons.

First, the exhaustion requirement rejected by *Sims* was judicially created, whereas the exhaustion requirement at issue here is created by statute. In *Sims*, the Court expressly distinguished issue exhaustion requirements created by statute or regulation, 120 S. Ct. at

2084, and recognized that such requirements are likely valid. *Ibid.* The Court cited a number of its prior decisions, as well as court of appeals decisions, enforcing statutory or regulatory issue exhaustion requirements for review of NLRB proceedings, see *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645 (1982), Federal Power Commission proceedings, see *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 497-498 (1955), and Federal Communications Commission proceedings, see *Washington Ass'n for Television & Children* v. *FCC*, 712 F.2d 677, 681-682 & n.6 (D.C. Cir. 1983). 120 S. Ct. at 2084 (also citing *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 36 n.6 (1952)). The *Sims* Court thus emphasized that its treatment of the judicially created issue exhaustion requirement for review of Social Security proceedings in no way affected the statutory issue exhaustion at issue in those cases. Nor does *Sims* affect the statutory issue exhaustion requirement in 38 U.S.C. 7292.

Second, as the court of appeals noted in *Belcher* (00-739 Pet. App. 5), *Sims* rejected an issue exhaustion requirement that would have required the claimant to exhaust issues in a nonadversarial administrative proceeding, whereas the instant cases concern a requirement that parties exhaust issues in a court. *Sims* noted that the rationale for requiring issue exhaustion is weakest in reviewing a nonadversarial administrative proceeding, stronger in reviewing an adversarial administrative proceeding, and strongest in reviewing a court decision. 120 S. Ct. at 2085. Thus, the reasoning that led the Court to reject the issue exhaustion requirement in *Sims* would lead to precisely the opposite result here, where the proceeding under review is a proceeding of the Veterans Court, which is a court of record following formal judicial procedures and where

the parties can be represented by counsel. See 38 U.S.C. 7251 (1994 & Supp. IV 1998) ("There is hereby established * * * a court of record to be known as the United States Court of Appeals of Veterans Appeals."); 38 U.S.C. 7261 (1994 & Supp. IV 1998) (setting forth the scope of review for the Veterans Court); 38 U.S.C. 7263 (1994 & Supp. IV 1998) (allowing legal representation and not binding claimants to the unpaid representation requirements applicable in administrative veterans benefit proceedings); 38 U.S.C. 7264; 38 U.S.C. 7264(c) (applying 28 U.S.C. 455, which deals with disqualification of judges, to the Veterans Court); 38 U.S.C. 7265 (granting the Veterans Court contempt authority).

Thus, the issue exhaustion requirement invoked in the instant cases is in no way inconsistent with *Sims*.

3. Subsequent to the court of appeals' decisions in petitioners' cases, a divided panel of the Federal Circuit decided *Forshey* v. *Gober*, 226 F.3d 1299 (2000), which is in some tension with the decision in these cases. Although the Veterans Court decision did not even mention the specific statutory provision (38 U.S.C. 5107(b)) that served as the basis for Forshey's appeal to the Federal Circuit, the *Forshey* majority held that the Veterans Court had "implicitly relied" on the provision in its decision. 226 F.3d at 1302. Judge Schall dissented from this holding, arguing that the majority's notion of "relied on" would "give this court jurisdiction over arguments challenging the validity or interpretation of any statute or regulation mentioned in a CAVC opinion or inherent to a CAVC decision, regardless of whether the arguments were presented to or considered by the CAVC." *Id.* at 1307. The government agreed that this expansive concept of when the Veterans Court had in fact "relied on" a statute was inconsistent with 38 U.S.C. 7292(a) (1994 & Supp. IV 1998) and the Federal

Circuit's prior application of that jurisdictional limitation, and thus has petitioned for rehearing in *Forshey* and suggested that the court of appeals review that decision *en banc*. The court of appeals has requested a reply to the petition.

The holding that the Veterans Court had "implicitly relied" on the statute was sufficient to satisfy 38 U.S.C. 7292(a), which requires *either* that the Veterans Court considered a statute *or* that the claimant raised the statute. 00-739 Pet. App. 4. The *Forshey* majority proceeded to address whether the court should nonetheless refrain from hearing the argument because Forshey had not raised the argument below. 226 F.3d at 1302-1303. In determining whether the Federal Circuit should impose an issue exhaustion requirement independent of 38 U.S.C. 7292, the court looked to *Sims* v. *Apfel*, 120 S. Ct. 2080 (2000). 226 F.3d at 1303. The majority stated that *Sims* v. *Apfel* applied with "equal, if not greater, force" in the veterans benefits context because the veterans benefit system is "intended to be 'a nonadversarial, ex parte, paternalistic system,' that is 'uniquely pro-claimant.'" *Ibid.* (quoting *Collaro* v. *West*, 136 F.3d 1304, 1309-1310 (Fed. Cir. 1988)). The *Forshey* majority recognized that *Belcher* had distinguished *Sims* (in the context of 38 U.S.C. 7292) on the ground that *Sims* involved "court review of agency decisions" (00-739 Pet. App. 5) as opposed to review of court decisions, but disagreed with that distinction on the ground that "the Veterans Court is not a fact finding body like a district court, and the administrative decision of the board, to the extent we are concerned, passes through the Veterans Court as a matter of law." 136 F.3d at 1302 n.3. In the petition for rehearing and rehearing *en banc*, the government did not argue for an independent issue exhaustion requirement in addition

to 38 U.S.C. 7292(a). The government did note, however, that *Forshey*'s discussion of *Sims* is inconsistent with *Belcher* regarding the nature of Veterans Court proceedings, and urged the Federal Circuit to resolve this inconsistency.

The decision in *Forshey* does not compel review of the *Smith* and *Belcher* decisions by this Court. Petitioners do not contend that the Veterans Court "implicitly relied" on the statute and regulation that formed the bases for their appeals to the Federal Circuit. Rather, petitioners argue that 38 U.S.C. 7292 does not impose an issue exhaustion requirement (00-739 Pet. 13-14; 00-754 Pet. 13-14), or, if it does, such a requirement is no longer valid in light of *Sims* v. *Apfel* (00-739 Pet. 6-12; 00-754 Pet. 6- 12). As discussed above, *Forshey*'s discussion of *Sims* does not address the validity of issue exhaustion in the context of 38 U.S.C. 7292, but instead addresses whether the Federal Circuit could impose an issue exhaustion requirement even if the Veterans Court had "relied on" a statute or regulation and thus satisfied 38 U.S.C. 7292. To the extent *Forshey* and the instant cases are in tension with respect to the application of *Sims* in the veterans benefit area, it "is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). And, regardless of developments in the Federal Circuit, it remains the case that the Federal Circuit's dismissal of petitioners' appeals does not contradict any decision of this Court. *Sims* v. *Apfel* emphasized that it does not call into question either statutory issue exhaustion or issue exhaustion which arises in the context of appellate review of lower court decisions. See 120 S. Ct. at 2084-2085.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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